No. 4660

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CHUN NGIT NGAN,

Plaintiff-in-Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A NEW JERSEY CORPORATION,

Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR

UPON WRIT OF ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII

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F. D. MONCKTON, *Clerk.*

By ....., *Deputy Clerk.*

INDEX

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STATEMENT OF FACTS

This cause is an action at law to recover the sum of Five Thousand Dollars ($5000.00) and interest upon an insurance policy.

On May 1, 1922, Yuen Tai Kam insured his life with The Prudential Insurance Company of America in the amount of Five Thousand Dollars ($5000.00) payable to Chun Ngit Ngan, his wife, who brings this action.

The policy contained the following provision:

> "INCONTESTABILITY. — This Policy shall be incontestable after one year from its date, except for nonpayment of premium, but if the age of the Insured be misstated the amount or amounts payable under this Policy shall be such as the premium would have purchased at the correct age." (R. p. 6.)

The insured died of tuberculosis on February 5, 1923, at Leahi Home, a sanitarium for the care of tubercular patients.

On April 7, 1923, after the death of the insured and within the period of one year from the issuance of the policy, The Prudential Insurance Company of America (hereinafter called the Company) made a tender to the beneficiary, plaintiff and plaintiff-in-error herein, of the amount of the first premium, the only amount therefore due and which had been paid by the insured, notifying the beneficiary that the insured had made certain misrepresentations, hereinafter referred to, to obtain the policy; that it considered the policy invalidated by fraud; that it refused to be bound by the policy or to pay the insurance covered thereby, and thereupon demanded of her the return of the policy (R. p. 87.) No legal proceedings of any nature were taken by the Company

to cancel or rescind the policy within the year following the date of its issuance. (R. p. 11, 17.)

On April 11, 1923, a petition for the appointment of an administrator of the Estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter, on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified. (R. p. 174.)

On June 27, 1923, Chun Ngit Ngan, the beneficiary brought this action under the insurance policy, to recover the Five Thousand Dollars. (R. p. 1.)

The cause was tried before one of the judges of the Circuit Court of the First Judicial Circuit, who rendered an opinion holding that the insured had made in his application for the policy false and fraudulent representations concerning his health; that such false representations were material, and induced the granting of the policy. But the court also held that the Company having failed to institute appropriate legal proceedings within one year after the issuance of the policy had failed to "contest" the same within the meaning of the insurance contract, and therefore could not in this action contest payment. (R. p. 10-12.)

From the judgment entered upon this decision of the trial court the Company took its writ of error. (R. p. 99.) The Supreme Court of the Territory, in a decision from which the Chief Justice dissented, reversed the trial court, holding that the terms of the insurance policy did not require a legal proceeding to constitute a "contest" of the policy within the year after its issuance, and that the tender to the bene-

ficiary of the premium paid by the insured, together with the declaration that it considered the policy invalidated by the misrepresentations of the insured and the demand for the return of the policy, constituted a contest. (R. p. 164-124

Following the entry of the Supreme Court's decision, Chun Ngit Ngan petitioned for a rehearing upon the grounds among others that the hypothesis adopted was opposed to the great weight of authority, and that the question was determined without being raised or argued by counsel. (R. p. 163.)

The court declined to grant a rehearing upon the ground that, although the hypothesis was not one upon which counsel had an opportunity to be heard, nevertheless it was not material to the decision of the case. (R. p. 167.) The Chief Justice dissented upon the ground that the case was a clear one on the point involved which was material to the decision and which had not been raised or argued by counsel on either side, declaring that it thus fell within Section 2259, R. L. 1915, being Section 2232, R. L. 1925, which reads as follows:

> "Sec. 2232. Additional argument by counsel. Upon all questions arising under the exercise of the jurisdiction of the supreme court, when argument of counsel may be desired or intended by the parties, or may be requested by the court, the court may order such argument to be had. And after the argument of any cause, or when the same is submitted on briefs, if the court is of opinion that a certain

> point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the same before the court."

Thereafter the cause was remanded to the trial court for further proceedings and a second judgment was entered, this time in favor of the defendant, the Company. The second judgment was rendered without trial, the parties stipulating the additional fact, which was not proved in the first trial, of the petition for and appointment of the administrators of the Estate of Yuen Tai Kam. (R. p. 175.)

This second judgment was entered without findings in the decision of the court, other than that it was based entirely upon and governed by the decision of the Supreme Court. (R. p. 175.) To this judgment plaintiff directed her writ-of-error and again brought the cause before the Supreme Court of the Territory of Hawaii. Without considering any further contentions raised by counsel, the court, upon the reasoning contained in the former opinion, affirmed the judgment of the trial court for the defendant, Chief Justice Peters again dissenting. (R. p. 192, 194.)

It is upon these facts that the plaintiff is now before this Court as the plaintiff-in-error in this cause, seeking the reversal of the second judgment entered in the trial court and affirmed by the Supreme Court of the Territory of Hawaii.

ERRORS RELIED ON

The following errors are assigned (R. p. 209):

Error No. 1

That the court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated March 31, 1925;

Error No. 2

That the court erred in making and entering its judgment on the 12th day of May, 1925, affirming the judgment of the Circuit Court of date March 31, 1925;

Error No. 3

That the court erred, in its opinion and decision of December 11, 1924, in holding that the insurance company had instituted a contest of policy within one year from the date of the policy;

Error No. 4

That the court erred, in its opinion and decision of December 11, 1924, in holding that the defense of fraud was available in the above entitled cause;

Error No. 5

That the court erred, in its opinion and decision of December 11, 1924, in holding that the ordinary, every day meaning of the word incontestable leads to the conclusion that the insurance company had contested the policy within a year after the date of the policy;

Error No. 6

That the court erred, in its opinion and decision of December 11, 1924, in holding that there was not any

difficulty in ascertaining what the ordinary meaning of "incontestable" is;

ERROR No. 7

That the court erred, in its opinion and decision of December 11, 1924, in holding that there was absolutely nothing in the policy to show that the word "incontestable" or its inferential antonym "contestable" was not used in its ordinary acceptation or was used only in its narrower meaning as an attack in court;

ERROR No. 8

That the court erred, in its opinion and decision of December 11, 1924, in holding that there is no provision in the policy to the effect that the "contest" which is permitted within the first year shall be by judicial proceedings only;

ERROR No. 9

That the court erred, in its opinion and decision of December 11, 1924, in construing the words "incontestable" and "contestable" according to the meaning which it held was intended by the lawyers for the insurance company instead of construing such words most strongly against the party providing the policy;

ERROR No. 10

That the court erred, in its opinion and decision of December 11, 1924, in holding that the origin and purpose of the clause of incontestability in policies are not open to doubt;

ERROR No. 11

That the court erred, in its opinion and decision of December 11, 1924, in holding that as the word "incontestable" is undoubtedly used in the policy as meaning indisputable in any way whatsoever, *i. e.,* in court or out of court, so also the inferential antonym "contestable" means disputable by any or every method which constitutes a dispute or attack, *i. e.,* in court or out of court;

ERROR No. 12

That the court erred, in its opinion and decision of December 11, 1924, in holding that the clause of incontestability relates to what may not be done after the prescribed period and does not attempt to prescribe what may be done within that period, and that, therefore, as to the latter, the rights of the insurer are as broad as they would have been if a clause of incontestability were not in the policy, and that therefore, without that clause those rights for the first year would have included the right to dispute or attack out of court as well as in court;

ERROR No. 13

That the court erred, in its opinion and decision of December 11, 1924, in holding that there is nothing in the requirement that after one year the policy shall not be contestable which prescribes or indicates how it may be contested within the year;

ERROR No. 14

That the court erred, in its opinion and decision of December 11, 1924, in holding that the policy is contestable other than judicially during the first year;

ERROR No. 15

That the court erred, in its opinion and decision of December 11, 1924, in repudiating what is recognized as an overwhelming weight of authority;

ERROR No. 16

That the court erred, in its opinion and decision of December 11, 1924, in holding that the policy does not specify a contest in law and does not specify any particular mode of contest whatever;

ERROR No. 17

That the court erred, in its opinion and decision of December 11, 1924, in holding that the rule that the language of a policy, because it was chosen by the insurer is in case of ambiguity to be taken most strongly against the insurer was not applicable in this case, because there is a statute of this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from the insurance; and in holding that the language of the policy under these circumstances is deemed not to be that of the insurance company;

ERROR No. 18

That the court erred, in its opinion and decision of December 11, 1924, in setting aside the judgment of the Circuit Court of the First Judicial Circuit of date May 12, 1924;

ERROR No. 19

That the court erred, in its decision of December 11, 1924, in granting a new trial;

ERROR No. 20

That the court erred, in its opinion and decision of January 8, 1925, in refusing a rehearing of the cause;

ERROR No. 21

That the court erred, in its opinion and decision of January 8, 1925, in holding that the decision of the court of December 11, 1924, that any ambiguity in the policy was not to be construed against the insurance company was not material to the decision;

ERROR No. 22

That the court erred, in its decision of January 8, 1925, in holding that a rehearing or reconsideration of the point whether any ambiguity should be construed against the insurer could not possibly affect the conclusion of the court that the judgment of the Circuit Court of May 12, 1924, must be reversed;

ERROR No. 23

That the court erred, in its decision of May 12, 1925, in affirming the judgment of the Circuit Court of March 31, 1925, upon the reasoning contained in the opinion of the Supreme Court of December 11, 1924;

ERROR No. 24

That the Supreme Court erred in failing to reverse the judgment of the Circuit Court of the First Judicial Circuit of March 31, 1925;

ERROR No. 25

That the Supreme Court erred in reversing the judgment of the Circuit Court of the First Judicial Circuit of May 12, 1924.

ARGUMENT

I.

THE ISSUE

The one substantial issue before this court is the question:

Does the tender of premiums to the beneficiary and the demand for the return of the policy made within the contestability period constitute a contest within the meaning of the policy?

It is admitted that the Company, within a year after the issuance of the policy, tendered back the premiums to the beneficiary and demanded the return of the policy. The plaintiff contends that this did not constitute a contest; that, to constitute a contest, some legal proceeding was necessary, either the institution of a suit by the Company or a defense to a suit by the beneficiary. The Company, on the other hand, contends that its conduct in tendering back the premiums paid and demanding a return of the policy was a contest within the incontestability clause, and thus was a full defense to a suit brought by the beneficiary after the expiration of the year from the issuance of the policy.

As the main issue itself is involved in all the subheadings of the argument, so there are certain assignments of error which are general and apply to each phase of the discussion. These are assignments of error numbers 1, 2, 3, 4, 14, 16, 18, 19, 23, 24 and 25.

II.

ANY AMBIGUITY IN THE POLICY IS TO BE CONSTRUED FAVORABLY TO THE INSURED.

The errors assigned as numbers 17 and 9 particularly present the question of the construction of the policy which should govern.

The first trial of this cause resulted in a judgment in favor of the plaintiff upon the one substantial point in issue: That is, that no contest had been instituted by the defendant prior to the expiration of one year after the policy was issued. This judgment was reversed by the Territorial Supreme Court in its first decision, and it is upon the basis of that decision that all the subsequent proceedings, resulting in the entering of final judgment in favor of the defendant, rest. Any error therefore in the original decision of the Supreme Court is basic, and goes to the root of the second judgment entered in favor of the defendant.

The Supreme Court of the Territory founded its first decision upon the purported axiom that the principle, which construes any ambiguity in insurance policies in favor of the insured, did not apply to the case at bar by reason of the fact that the statutes of the Territory of Hawaii provide for a standard life insurance policy. (R. p. 106.)

The standard policy requirement referred to reads as follows:

> "A provision that the policy shall constitute the entire contract between the parties, and

shall be incontestable not later than two years from its date, except for nonpayment of premiums. . . ."

R. L. 1925, *Sec.* 3464 (3).

It is submitted that the reasoning of the Supreme Court on this fundamental point upon which all subsequent reasoning of the court was based, is erroneous in two particulars: First, in that the incontestable clause in the policy of this cause is not dictated by the statute; and second, in that the adoption by the statute of a standard policy embracing clauses long contained in insurance policies and receiving repeated judicial construction prior to the enactment of the statute, does not affect the principle of construction that the policy must be interpreted in all cases of ambiguity most favorably to the insured.

Upon the first point, the court will note that the statute is a broad one and merely sets the limits within which the parties may contract. It declares that there must be an incontestable clause of not more than two years but it leaves to the judgment of the parties the time within that period which the insurance company may have to contest.

The insurance company incorporated into its contract in this case a provision rendering the policy incontestable, except for non-payment of premiums, after *one year* from its issuance, thus making the clause a purely contractual one subject to the usual construction of such contracts, that is, the solution of all ambiguity in favor of the insured. All that the statute required was some incontestable clause

not to exceed two years. The insurance company chose to act well within the limit, thus freeing its contract with the insured from any implication of a necessity imposed by statute.

If such a clause is to be released from the requirement of construction favorable to the insured, it can only be upon the ground of statutory necessity, the laying upon the insurance company of an absolute requirement by the statute which gives the company no option in the matter and therefore releases it from any unfavorable implications arising through the adoption of the statutory requirement.

In this case, however, the terms of the policy show that the company felt itself under no obligation under the statute. It went further than any statutory requirement and, as an inducement to the insured, inserted an incontestability clause of one year. Thus the argument arising from necessity has no application, and the old principle long sanctioned by the courts that insurance contracts are to be construed in favor of the insured has complete application.

Upon the second point, also, the court erred. One of the cases cited in the briefs before the court, is seized upon to supply the assumption which the court asserts that the usual construction of a policy favorably to the insured does not apply where the statute requires a standard form.

At this point a digression may be excusable to disclose briefly an error which will be later developed under a separate assignment.

The court passed upon this fundamental question of the principle of construction to be applied, without the matter having been raised or argued by counsel. This, in itself, constituted an error under the statutes of Hawaii, as will be shown later. But it also grievously handicapped the court in its consideration of the question. Had the point been raised by counsel or called to counsels' attention by the court, the authorities would have been exhaustively presented and the question heard upon its legal merits. As it was, without a careful examination of the law, or advising counsel that the point was under consideration, the court based its entire reasoning upon an assumption drawn from, but not adopted by, one of the cited authorities, an assumption discredited both by reason and authority.

The best reasoning, as well as weight of authority, supports the view that the action of legislatures in passing statutes requiring standard policies was still to protect the insured and not to secure to the insurer an advantage from the construction of its own instruments which it never would have had in the absence of statute.

Statutory requirements of standard policies are based upon the purpose of the legislature to secure protection to the insured in their contracts by having incorporated therein the general terms and safeguards which have been inserted in policies through long experience and sanctioned through long judicial construction. The purpose of such enactments is not to deprive the insured of that fundamental right of

favorable construction which arises from the fact that the insurance companies use their own language, but rather as an additional protection to the insured. The reason for favorable construction to the insured remains the same. The language of the policy is not dictated by the legislature, it is still the work of art of experienced insurance men trained to use terms of art, and in such fashion that their companies may receive every benefit from the language of the policy which their efforts can give. The reason for the protective construction favorable to the insured thus remains the same. No revolution of construction depriving the insured of one of his most substantial rights should arise from the statutes which were intended rather to protect him than to deprive him of the shield which the law has developed.

This has nowhere been better expressed than in Vance on Insurance, page 430, adopted in Gazzam v. German Union Fire Insurance Co., 155 N. C. 330, 71 S. E. 434, 437; and in Ins. Co. of North America v. O'Bannon, Tex. Civ. A., 170 S. W. 1055:

> "It has been contended that inasmuch as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited particulars, the insurer cannot be regarded as selecting the terms of the contract, and subjected to an unfavorable rule of construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the con-

> struction given by the precedent cases to similar terms in other policies, and therefore ought to be regarded as being used in the sense of their previous construction. It is also apparent from an examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests."

If a doubt exists as to the meaning of a policy it should be resolved in favor of the insured rather than in the interest of the insurer. The Standard Policy Act does not modify this principle, as the subject matter of the insurance is still expressed in the language of the insurer.

Levinton v. Ohio Farmers Ins. Co., 267 Pa. 448, 110 Atl. 295.

Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751.

Maisel v. Fire Ass'n of Philadelphia, 69 N. Y. Supp. 181.

It is not to be presumed that the legislature intended, by prescribing the form of contract and prohibiting any other, to give it effect in depriving a party of rights which as a contract it would not have had.

Dunton v. Westchester Fire Ins. Co., Me., 71 Atl. 1037.

Contracts of insurance are construed against the insurer and in favor of the insured and this has not

been changed by the adoption of a standard form of insurance policy.

Cottingham v. Md. Motor Car Ins. Co., 168 N. C., 259, 84 S. E. 274.

Johnson & Stroud v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124.

Smith v. National Fire Insurance Co., 175 N. C. 314, 95 S. E. 562.

Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 Atl. 525.

Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80.

Leisen v. St. Paul F. & M. Ins. Co., N. D. 127, N. W. 837.

The New York cases are especially significant inasmuch as the standard form of policy of Hawaii has been adopted from New York and the incontestability clause referred to in both standard policies of Hawaii and New York is identical. The New York statute in force at the time of the declaration by the New York courts of the rule that the adoption of the standard policy by the legislature, did not affect its interpretation favorably to the insured, and in force also at the time of its adoption by the Legislature of Hawaii, reads as follows:

> *"Birdeye's Cumming and Gilbert's Consolidated Laws of New York,* ann. Vol. II, p. 2592 (1913).
>
> S. 101. Standard provisions. On and after January first, nineteen hundred and ten, no policy of life or endowment insurance shall be

issued or delivered in this state unless and until a copy of the form thereof has been filed with the superintendent of insurance and formally approved by him; nor shall such policy except policies of industrial insurance where the premiums are payable weekly, be so issued or delivered unless it contains in substance the following provisions:

. . . . . .

2. A provision that the policy shall be incontestable after two years from its date of issue except for nonpayment of premium and except for violation of the conditions of the policy relating to military or naval service in time of war."

Thus, under the rule that the adoption of a statute carries with it the judicial construction of its effect, the Hawaiian legislature enacted, with the standard policy the rule that the language thereof was still to be construed in all cases of ambiguity favorably to the insured.

Territory v. Pacific Coast Casualty Co., 22 Haw. 446, 453.

It is submitted, therefore, that all ambiguities should be construed favorably to the insured.

"The rule is settled that, in case of ambiguity, that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company, and it is consistent with both reason and justice that any fair doubt as to the mean-

ing of its own words should be resolved against it. First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 678, 679, 24 L. ed. 563, 565; Thompson v. Phenix Ins. Co. 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019; Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 462, 38 L. ed. 231, 235, 14 Sup. Ct. Rep. 379."

Mutual Ins. Co. v. Hurni Co., 263 U. S. 167, 174.

III.

THE RULE THAT IN CASE OF AMBIGUITY THE LANGUAGE OF AN INSURANCE POLICY IS TO BE TAKEN MOST STRONGLY AGAINST THE INSURER, SHOULD NOT HAVE BEEN REPUDIATED WITHOUT GIVING COUNSEL A CHANCE TO BE HEARD.

The discussion of this branch of the cause falls particularly within assignments of error numbers 17, 20, 21 and 22.

The first statement of law in the decision of the Supreme Court of December 11, 1924—the decision upon which all the issues in the case are founded—was that by virtue of the adoption of a standard insurance policy in Hawaii, the well recognized rule that in cases of ambiguity insurance policies are to be construed in favor of the insured did not apply. This question was neither raised in the assignments of error before the Supreme Court nor was it argued in any manner by counsel; yet the Supreme Court

used it as a hypothesis upon which it based its decision.

An examination of points 1 and 3 (particularly 3) in the opinion of the Supreme Court of Hawaii of December 11, 1924, shows what a large part was played in the decision of the case by the assumption of the Supreme Court that the rule requiring ambiguous phrases to be construed in a manner most favorable to the insured did not apply. Section 3 of the opinion shows clearly that the court, far from construing the policy favorably to the insured, adopted exactly the opposite interpretation and construed it favorably to the insurer. The court, as a basis of its argument, used exactly the reasoning that has led judges, ever since the inception of insurance policies, to indulge in constructions favorable to the insured. That is, the Hawaiian court considered the fact that the incontestability clause was drawn by the ablest lawyers available to insurance companies; that the clause was intended to further the interests of the insurance companies and so should be construed to favor those interests.

It is the very fact that insurance policies are drawn by the ablest lawyers the companies can command that has laid upon courts, in the requirements of justice, the necessity of construing any questionable words or phrases so as to protect the insured.

It was upon the ground that a material part of the case was thus decided, without permitting counsel to be heard, that the insured requested a rehearing under the rules of the court. (R. p. 163).

The theory of the petition for rehearing was that petitioner had been foreclosed of a substantial right in violation of Section 2232, R. L. 1925 (Appendix) forbidding the determination of a case upon any point material to the decision, which had not been raised or argued by counsel on either side, until counsel for both sides have had an opportunity of arguing the same before the court.

The court considered the petition for rehearing but declined to grant counsel an opportunity to be heard on the ground that the determination by the court in the decision of December 11, 1924, that the rule of construction requiring ambiguities to be interpreted favorably to the insured, did not apply, was not material to the case. (R. p. 167.)

An examination of the opinion of December 11th (R. p. 104), however, as the insured has attempted to demonstrate, indicates how strongly the court relied upon the non-application of that rule in order to reach its conclusion. In portions of its argument the court develops the theory that the incontestability clause is not ambiguous because it clearly means not only "litigate" but other forms of protest. But litigation and other forms of protest are in themselves different species of "contest," and establish that double meaning which in itself constitutes ambiguity. Again, the court in reaching the conclusion that "contest" (and its derivatives) is unambiguous when used in an insurance policy, has emphasized the fact that the words were selected by the ablest lawyers available to the Company and,

therefore, should be construed most favorably to the Company for that was undoubtedly what the lawyers intended. So runs the argument of the Hawaiian Court which, to the mind of counsel, establishes the basic materiality to the court's conclusion, of the repudiation of the rule of construction favorable to the insured.

It is submitted, that the Supreme Court based the major part of its argument on the material assumption that the policy was not to be construed favorably to the insured and that the court erred not only in adopting such an assumption but in adopting it without permitting counsel to be heard upon the merits thereof.

IV.

THE COURT ERRED IN HOLDING THAT THERE WAS NO AMBIGUITY IN THE INCONTESTABILITY CLAUSE AND THAT "CONTEST," OR RATHER ITS "INFERENTIAL ANTONYM," "INCONTESTABLE," MEANT "NOT TO BE DISPUTED IN ANY WAY, WHETHER IN COURT OR OUT OF COURT."

This branch of the subject is covered by assignments of error numbers 10, 5, 6, 7, 8, 9 and 11.

The primary thesis of the court in determining that the insurance company had instituted a contest within a period of one year from the issuance of the policy was that there was no ambiguity in the incontestability clause, that the clause meant any type of protest, whether in or out of court.

In developing its argument, under section 1 of the court's opinion (R. p. 106-108) the various definitions of "contest" and its derivatives and antonyms were discussed. The court particularly emphasizes that each definition contains a number of possible meanings, the meaning "litigate" being one of those meanings. Indeed, the primary meaning of "contest" is "litigate." The word contest comes from the Latin *contestare,* meaning "to call to witness, bring an action." (Century Dictionary Encyclopaedia.)

The court overlooked, however, in consulting the dictionaries, the definition of the word "ambiguous." The term "ambiguous" in its very essence means "capable of being understood in more senses than one."

> "Ambiguous—Capable of being understood in more senses than one; obscure in meaning through indefiniteness of expression; having a double meaning. . . .
>
> "Ambiguity—The quality of being ambiguous, obscure, or uncertain, in meaning, especially where either of two interpretations is possible. . . ."

Funk & Wagnall's New Standard Dic. of the Eng. Language (1915).

> "Ambiguous—Capable of being understood in either of two or more possible senses.
>
> "Ambiguity—Duplicity in meaning. . . ."

Webster's New International Dictionary (1923).

Yet because the word "contest" or "incontestable" is demonstrated by the court to its own satisfaction as being capable of being understood in more senses than one, or as having a possible choice of one or more interpretations, the court jumps to the conclusion that the clause is therefore *not* ambiguous but must clearly have embraced every one of those meanings.

Those words only can be called unambiguous which have but one meaning and the definition of which is given in synonyms, each synonym of the original word being a synonym of the other definitions. When a word is ambiguous, however, the synonyms of the original word need not be synonyms of each other. One of the ultimate tests of whether a word is ambiguous or not lies in the determination of whether the various other words that it means are all equivalent to each other or mean different things. If they mean different things in different circumstances, then the word is ambiguous and must be construed according to its surroundings.

The word "contest" is typically ambiguous, meaning different things to different men, under different circumstances. Thus, being ambiguous, that meaning which is most favorable to the insured, that is the requirement of litigation, should be given it when construing the policy drawn in the language selected by the insurer.

The court having determined that the incontestability clause was unambiguous then went a step

further and held that the word "contest" and its derivatives, as used in such a clause, is unambiguous because it is not restricted to proceedings in court but includes all methods of protest.

This decision was reached in the face of what the court recognized as an overwhelming weight of numerical authority, the major part of the courts of the United States having judicially determined that contest in such a clause can mean nothing but a judicial determination, or court proceedings.

It is submitted, that if the word "contest" is unambiguous in the light of its history and judicial interpretation, it can only be because, as the court said in Ramsey v. Old Colony L. Ins. Co. 297 Ill. 592, 131 N. E. 108, adopted in Humpston v. State Mut. L. Assur. Co., Tenn, 256 S. W. 438, 443:

> "The language is not ambiguous. It admits of no reasonable construction, as the courts have said in the cases already cited, other than that the company may have one year, and no more, for the investigation of the questions material to its risk, and if it does not within that time, either as plaintiff or defendant, contest the policy, it cannot do so afterward. Such contest can be made only by proceedings in court to which the insurer and the insured or his representatives or beneficiaries, are parties."

To say that a word or clause in an insurance policy is not only unambiguous but has a meaning that has been repudiated by a long line of judicial authority

appeals to the plaintiff-in-error as faulty logic. The meaning either should be settled by the great weight of authority, or, if that is not absolutely decisive, it may be ambiguous. It surely cannot be a correct method of reasoning to say there is no ambiguity in the phrase, but that it means something which the repeated decisions of the courts of highest standing have declared it cannot mean. The beneficiary earnestly contends that the decision of the Supreme Court of Hawaii is impaled upon the horns of a dilemma. Either the incontestability clause is ambiguous, in which case the court erred in failing to allow counsel to be heard upon the most material point of whether the adoption of a standard policy nullifies the rule that ambiguities are to be resolved favorably to the insured; or else it is not ambiguous because the meaning has been settled by a series of judicial decisions which have interpreted the clause to require a contest by litigation alone.

V.

THE REQUIREMENT OF "CONTEST" WITHIN THE INCONTESTABILITY CLAUSE OF A POLICY IS OF JUDICIAL ACTION.

This branch of the argument is particularly covered by assignments of error numbers 5, 6, 7, 8, 10, 11 and 15.

Many of the state courts, as well as the Federal tribunals, have passed upon the incontestability clause of insurance policies. The fact that this clause

has been so widely adopted and so frequently construed shows how little it has been affected by the requirement of a standard policy. In other words, it is the choice of the insurance companies.

These courts have almost uniformly construed that clause to require the insurance companies to either rescind the policies before the termination of the limitation period or else to bring legal proceedings looking to a decree of rescission. When rescission is spoken of as apart from judicial action, a concurrence of will of the parties is meant.

The Hawaiian Court recognized that the overwhelming numerical weight of authority was against it, but based its decision on what it called the weight of authority in reason. (R. p. 104-124) We will attempt to show that the only cases supporting the construction of the Hawaiian court are of minor authority as coming from intermediate courts or as being more dictum that anything else.

A.

"CONTEST" JUDICIALLY DEFINED

The courts of Illinois, Indiana, Missouri, Oklahoma, North Carolina, Tennessee, Arkansas and Michigan, the United States Circuit Courts of the fourth and fifth circuits, and of the District Courts of Kansas, as well as, inferentially at least, the United States Supreme Court have all construed the incontestability clause to require a contest in a judicial proceeding.

Within a year of the date of the policy, the insured in the meantime having died, the insurance company

denied liability on the policy, but took no judicial action. In an action on the policy after the year had elapsed the court held that no defense of breach of warranty could be made by the insurer, as the policy contained the one year incontestability clause. The court said:

> "Incontestable means not contestable. A contest in law implies an adversary proceeding in which matter in controversy may be settled by the courts upon issue joined."

Missouri State Life Ins. Co. v. Cranford, 161 Ark. 602, 257 S. W. 66, 69.

In North Carolina the court has held:

> "Where a policy of life insurance, containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premium, has been delivered and the premium paid therefor, an attempt by the insurer within that time, upon notification to the insured, to cancel the policy with tender of repayment of the premium upon a different ground than that stated in the clause, but not consented to or accepted by the latter, is a breach of the contract by the former; and it is necessary for the insurer, within the stated time, to bring suit in equity for the cancellation of the policy, or it will remain binding and enforceable upon the insured's death."

Trust Co. v. Insurance Co. 173 N. C. 558, 92 S. E. 706.

Hardy v. Phoenix Mut. Life Ins. Co. 180 N. C 180, 104 S. E. 166, 168, cited in Hurni Packing case, 263 U. S. 167, 68 L. Ed. 45, 48.

The Circuit Court of Appeals of the Fifth Circuit has held:

> "A contest so provided for imports litigation, the invoking of judicial action to cancel or prevent the enforcement of the policy, either by a suit to that end or by a defense to an action on the policy. A mere denial or rejudication by the insurer of its liability under the policy, accompanied by a tender of the premium paid, is not a contest, within the meaning of the provision."

Northwestern Mut. Life Ins. Co. v. Pickering, 293 Fed. 496, 499 certiorari denied 68 L. Ed. 258.

Jefferson Standard L. Ins. Co. v. McIntyre, 294 Fed. 886.

Repala v. John Hancock Mut. Life Ins. Co., 229 Mich., 463, 201 N. W. 465.

In Tennessee, the Supreme Court adopted the language of the trial judge:

> "It takes two to make a contract and likewise it takes two to rescind one (Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981), or the judgment of a court of competent jurisdiction at the instance of the party having a good ground for rescission. It is true that the defendant undertook to rescind the contract in this case upon the ground of complainant's fraud in procuring it, on August 29, 1922, by deliver-

ing to complainant on that date a written notice to that effect and demanding the surrender of the policy. But complainant refused to agree to the rescission and refused to surrender the policy. The contract was therefore not rescinded merely by the act of the defendant in giving said notice. It was open to the defendant thereafter to repent of its act and treat the policy as in full force and effect, or it might elect to have its right to rescind tested and enforced by a court, either by itself instituting a suit for that purpose or by interposing it as a defense if sued. In my opinion it takes the one or the other of these steps to constitute a contest of the policy within the meaning of the statute and the contractual limitation found in the policy. In the instant case this was not done until the answer and cross-bill was filed on October 16, 1922, which was after the one year had elapsed in any view of the date of issue of the policy."

Thistle v. Eq. Life Ass. Soc. (Tenn.) 261 S. W. 667.

In Illinois the court held:

"Such contest can be made only by proceedings in court to which the insurer and the insured, or his representatives or beneficiaries are parties."

Ramsey v. Old Colony Life. Ins. Co., 297 Ill. 592, 131 N. E. 108, 110; cited in Hurni Packing Case, 263 U. S. 167, 68 L. Ed. 45, 48.

See *LaVelle v. Metropolitan Life Ins. Co.,* 209 Mo. A. 330, 238 S. W. 504.

The Oklahoma court has held:

> "Certainly, in the absence of authority contained in the contract of insurance, the insurer was without power to determine as to the truthfulness of statements contained in the application for insurance, and to declare the policy forfeited. If the insurer desired to avoid the policy, on the ground of misrepresentations contained in the application for insurance, it should, in the absence of the consent on the part of the insured and the beneficiaries named in the policy, have taken legal steps to do so within two years from the date of issuance of the policy, and, failing so to do within two years from the date of the issue of the policy, the policy of insurance was incontestable on the ground of breaches or warranties contained in the application."

Mutual Life Ins. Co. v. Buford, 61 Okl. 158, 160 Pac. 928.

See also

Powell v. Mutual Life Ins. Co., 313 Ill. 161, 144 N. E. 825.

New York Life Ins. Co. v. Adams, Ind. App., 145 N. E. 499.

Reliance Life Ins. Co. v. Thayer, 84 Okl. 238, 203 Pac. 190, 193.

In addition to the cases actually defining the term "contest," in the incontestability clause, as begin-

ning court action, there are numerous cases which, while not expressly defining the term, do not hold that nothing short of judicial action is enough.

In Jefferson Standard Life Insurance Co. v. Keeton, 292 Fed. 53 (C. C. A. 4th Circuit), it appeared that the policy of insurance was issued in April, 1921; that the insured died August 26, 1921; that on November 28, 1921, the insurer tendered back the premiums and demanded surrender of the policy for false statements made in the application. The demand was refused, and on the next day the Company filed its proceeding in equity to cancel the policy. The court held that it was properly filed, as had they waited to bring suit or to defend suit until more than a year had lapsed, the incontestability clause would apply, and the Insurance Company could have made no defense.

In Plotner v. Northwestern National Life Insurance Co., 48 N. D. 295, 183 N. W. 1000, the policy contained the usual provision that it should be incontestable except for nonpayment of premiums, and was dated July 28th, 1919. The insured died December 15, 1919. Due proof of death was furnished the Company, and it declined to pay. Suit was commenced on July 31, 1920, on the policy. The court held that the company could not rely upon the incontestability clause because it permitted a year and more to expire before it took any action to avoid or rescind the policy.

In Humpston v. State Mutual Life Assur. Co., 148 Tenn. 439, 256 S. W. 438, the court held that a letter

written by the Insurance Company to a beneficiary under a life policy, after death of insured and proof of claim, refusing to pay the claim, did not rescind the policy within the incontestability clause.

In Ebner v. Ohio States Life Ins. Co., 69 Ind. App. 32, 121 N. E. 315, the Insurance Company brought an action to cancel the policy within the contestability period. The court held that the insurer had the right to its action to cancel the policy in equity within the period named in the incontestability clause, on the ground that the remedy by defending an action on the policy is inadequate. That the bringing of proper action within the contestability period is necessary.

In American Trust Co. v. Life Insurance Co., 173 N. C. 558, 92 S. E. 706, the court held that if there is reasonable doubt as to the extent of the application of the incontestable clause, it must be solved in favor of the beneficiary (citing, Mareck v. Life Asso. 62 Minn. 39; 54 A. S. R. 613; Royal Circle v. Achterrah 204 Ill. 549; 63 L. R. A. 452); and that under an incontestability clause, the insurance company must take affirmative action within the period of contestability, and that the manner in which it must take affirmative action is by taking legal action (citing Wright v. Benefit Association, 43 Hun. 65. Affirmed 118 N. Y. 237, 16 A. S. R. 749).

In Great Western Life Assurance Co. v. Snavely, 206 Fed. 20 (C. C. A. 9th Circuit), the court held that an incontestable clause precludes any defense after the expiration of one year on account of false statements warranted to be true, although it may have

been made for a fraudulent purpose; that such clause constitutes in effect a short period of limitation which it is perfectly competent for the parties to agree upon.

B.

THE AUTHORITY OF THE FEDERAL COURTS REQUIRES A JUDICIAL CONTEST

The Federal Authorities, although from several jurisdictions, are harmonious, with two exceptions, to the effect that the incontestability clause in the policy of insurance requires a judicial action to constitute a contest.

We have already cited Jefferson Standard Life Insurance Company v. Keeton, 292 Fed. 53; Northwestern Mut. Life Ins. Co. v. Pickering, 293 Fed. 496, 499; Jefferson Standard Life Insurance Company v. McIntyre, 294 Fed. 886, holding that judicial action is required to contest the policy.

In addition, the principle has recently been adopted in the District Court of the United States for the District of Kansas, 1st Division, in the case of Harwi v. Metropolitan Insurance Company, 297 Fed. 479, upon the authority of Mutual Life Insurance Company v. Hurni, 263 U. S. 167, the court saying:

> "However, under such policies as those involved in this case, unless an action at law may be instituted within two years from date of policy, the incontestability clause cuts off the making of such defenses."

It is interesting to note that the two exceptions to this rule rest in a dictum, unsupported by argument

or citation of authority, in the Hurni Case, 280 Fed. 18, when it was tried in the Circuit Court, and which we believe was disapproved in substance on this point when it was affirmed on appeal in the Supreme Court of the United States, and the decision in the case of Mutual Life Insurance Company v. Rose, 294 Fed. 122, a District Court case which was decided solely upon the authority of the dictum in the Hurni Case, supra.

C.

THE SUPREME COURT OF THE UNITED STATES FAVORS THE VIEW THAT JUDICIAL ACTION MUST BE INSTITUTED.

That the Supreme Court of the United States approves the theory so uniformly adopted by the courts, that a contest within the incontestability clause of a policy requires judicial action, is shown by two cases in the United States Supreme Court. The first being that in N. W. Mutual Life Ins. Co. v. Pickering, 68 L. Ed. 258, when the Supreme Court denied a Writ of Certiorari in the Northwestern Mutual Life Insurance Company v. Pickering 293 Fed. 496; the Pickering case was decided upon this very point, so that when the Supreme Court denied a Writ of Certiorari it inferentially declined thereby to find any error in the determination of the lower court.

Again in the recent leading case of Mutual Life Ins. Co. v. Hurni, 263 U. S. 167, 68 L. Ed. 45, the Supreme Court in effect approved the principle that

judicial action was necessary to institute contest. It is true that in that case the question was not directly decided, but the cases sustaining the theory cited to the court were distinguished and in effect disapproved. The history of that case is as follows:

Upon the first appeal of that cause in 260 Fed. 641, the court held that the jury had been improperly directed to find for the plaintiff, there being a strong showing of misrepresentation by the insured. The incontestability of the policy was not brought to the attention of the court. Upon the second trial the incontestability clause was urged and upon appeal to the Circuit Court of Appeals again, the Court held that the clause barred the defense of false representations. It appeared from the facts that the policy was dated August 23rd, 1915, and contained a two years' incontestability clause. On July 4th, 1917, the insured died. Proofs of death and claim were properly made on August 24th, 1917. The insurance company wrote declining to pay the policy upon the ground from misrepresentation. The Circuit Court held that the contestable period ran from the date upon the policy and that no contest had been made in time. The court, without the necessity of passing upon the question inasmuch as the letter declining to pay was not written within two years, yet declared that such letter was a sufficient contest within the meaning of the policy. This dictum is supported by no citation of authorities and by no reasoning.

The United States Supreme Court granted a Writ of Certiorari and affirmed the decision of the Circuit

Court of Appeals, basing its affirmance upon two grounds:

1. That in considering the incontestability clause, that construction of the policy would be adopted which was most favorable to the insured.

2. That the incontestability clause continued to run after the death of the insured and was not suspended by his death.

As the Court found that the policy ran from the date upon it, and therefore the letter of repudiation was written after the two years from the date of its issuance had expired, it was unnecessary to pass upon the meaning of "contest."

The contention made by the defendant-in-error in the Hawaiian court and which we presume will be repeated here, is however that the Supreme Court "held in affirmance of the Circuit Court of Appeals that *although the contest was sufficient it was not made by the insurer in time.*"

In its discussion of the second ground of decision that the incontestability period continues to run after the death of the insured, the Supreme Court cites the leading cases which hold that a contest under such a clause means a legal proceeding instituted by the insurer. Justice Sutherland moreover distinguishes two of the leading cases cited in the Hawaiian court by counsel for the Mutual Life Insurance Co., and while not directly putting the ban of disapproval upon them, declares they cannot apply, because the policies in those cases contained the requirement that the policy must have been "in force"

for a period of two years before contest was foreclosed, a requirement which was not formed in the Mutual Life Policy or in the case at bar.

As counsel for the defendant-in-error disagrees with us in the application of this case we refer to judicial authority to sustain us in our construction of the case, in Harwi v. Mutual Life Ins. Co., 297 Fed. 479. Judge Pollock of the Federal Court directly recognizes Mutual Life Ins. Co. v. Hurni, 263 U. S. 167 as authority for the principle, that to constitute a contest, the Insurance Company must institute an action at law. See also Jefferson Standard Life Insurance Co. v. McIntyre, 294 Fed. 886; Mo. State Life Ins. Co. v. Cranford, 161 Ark. 602, 257 S. W. 66, 69 (both prevailing and dissenting opinion).

D.

THE CASES RELIED UPON BY THE INSURANCE COMPANY DISTINGUISHED

In support of its argument before the Hawaiian court, the insurance company cited five cases on the main issues and discussed them at length.

The first was the Hurni Packing case in the United States Supreme Court, which we have already discussed.

The second was the case of the Mutual Life Ins. Co. of New York v. Rose, 294 Fed. 122, decided in the Federal District Court of Kentucky. There it was held that equity has jurisdiction of a suit for cancellation of a life policy during the lifetime of the in-

sured even though such suit for cancellation was brought more than two years after the issuance of the policy, although the policy contained the provision that it should be incontestable after two years from its date of issue. The case was decided upon the dictum of Mutual Life Insurance Company v. Hurni Packing Company, 280 Fed. 18, a case affirmed without discussing the dictum in the Supreme Court of the United States. (Mutual Life Ins. Co. v. Hurni Packing Co. 263, U. S. 167, 68 L. Ed. 45.) Moreover, the Rose case repudiates the well settled rule that an extra-judicial rescission must be acquiesced in by both parties in order to be effective.

It is submitted that the discussion in the case of Mutual Life v. Rose is repudiated by every case save that of the Hurni Packing case in the lower court, and the theory is repudiated by inference at least when that Hurni Packing case reached the Supreme Court of the United States; that the case overlooks the overwhelming majority of the authorities and is wholly at variance with the settled law on the subject.

The third was the case of Markowitz v. Metropolitan Life Insurance Company, 203 N. Y. S. 534. That case held that the incontestable clause in a policy was not effective when the insured died within the contestable period, because the rights of the parties are fixed by the insured's death. This rule has been once and for all disposed of by the Hurni Packing case in the United States Supreme Court, where it said that "the provision plainly is that the policy

shall be incontestable upon the simple condition that two years shall have elapsed from its date of issuance; not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event."

It is interesting to observe that the New York case declares that the only authority sustaining plaintiff is Monahan v. Metropolitan Life Insurance, 283 Ill. 136 L. R. A. 1918 D, 1196. That statement in itself shows the cause was not fully presented.

The fourth is Mutual Life Insurance Company of New York v. Stevens, Minn., 195 N. W. 913. That case was a petition for cancellation brought by the company within the contestable time as provided by the insurance policy. The court held that the action would not lie as petitioner had a good remedy at law in a defense to any action brought by the insured's beneficiary even though brought after the lapsing of the incontestable period. This was based solely upon the theory that the incontestable provision no longer applies if the insured dies within the time limited for contestability; that the rights of the parties are fixed upon the death of the insured. This theory was effectually disposed of by the decision directly against it in Mutual Life Insurance Company v. Hurni Packing Co., 263 U. S. 167, 68 L. Ed. 45.

The fifth case cited by plaintiff-in-error—that of the Jefferson Standard Life Insurance Company v. Smith, 248 S. W. 897, a case decided not in Kentucky, but in Arkansas—has been overruled in Missouri State Life Insurance Company v. Cranford, 257 S. W.

66, at 68, and upon the direct authority of the Hurni Packing case.

Since the decision of this cause in our local Supreme Court, two cases have been reported which will probably be cited by the defendant-in-error. One is the case of Liebsker v. New York Life Ins. Co., Ill. App. (1924). The court in New York Life Ins. Co. v. Adams, Ind. App., 145 N. E. 499, at 503, said of this case:

> "In view of the decision of the Supreme Court of that state in Powell v. Mutual Life Ins. Co., 313 Ill. 161, 144 N. E. 825, the Liebsker case cannot be considered as authoritative."

The remarks of the court in Feierman v. Eureka Life Ins. Co. 279 Pa. 507, 124 Atl. 171, were purely obiter on this subject, as no attempt had been made to rescind or cancel the policy during the contestable period.

It is urged that none of these cases is authority for the proposition that tender of premiums and demand for the policy within the contestability period permits the company to defend on any ground, save nonpayment of premiums, after the termination of the contestability period, save the Rose case, 294 Fed. 122. That case we believe to be an insubstantial authority in view of the great weight of both reason and number of cases directly supporting the contention of the plaintiff-in-error. For one thing, as has already been pointed out, the Rose case repudiates the rule that a rescission is not the act of one party

but must be reached by the concurrence of minds or by its judicial determination; for another reason, the determination is by one judge of a Federal District Court and is opposed by at least three decisions by full circuit courts of appeal; and for a final reason, the case has not yet been finally determined. The opinion was rendered in an intermediate stage. From the last information which the plaintiff-in-error in this case has, the Rose case is still before the court and no final judgment has yet been reached.

It is urged, therefore, that to follow this decision of a court which is not one of final resort, upon a case which has not yet reached a final judgment, would be an error of policy, particularly in view of the final determination of the principle by the courts of ultimate resort in so many of the states and by the Federal Circuit Courts of Appeal that there must be litigation to contest a policy under the incontestability clause.

VI.

THE RESCISSION OF A CONTRACT REQUIRES EITHER COURT ACTION OR A MEETING OF THE MINDS OF THE PARTIES.

This branch of the argument is particularly covered by assignments of error number 12 and 13.

The local court in determining that a tender back of premiums together with a demand for return of the policy constitutes a contest, argues that any protest on the part of the Company prior to the expira-

tion of one year after the policy is issued is sufficient. The opinion apparently recognizes that no rescission can be shown (R. p. 104-124) but meets that objection by saying that contest is a broader word than rescission, and that rescission is not necessary.

But a contest before the expiration of the year which neither acts as a rescission of the contract, nor operates to give the court jurisdiction within that year is ineffectual. At the termination of the year, by the terms of the policy itself, neither that contest nor any other—save for nonpayment of premiums—can be pleaded in defense to any action on the policy. A "contest" before the expiration of the one year limitation period is only successful if it either rescinds the policy and thus destroys the contract as such, or gives a court jurisdiction to render its decree rescinding the contract. A mere protest, a voice crying out in the wilderness, has no effect if it must instantly be stilled upon the determination of the year after the issuance of the policy.

This principle has been recognized repeatedly in judicial decisions throughout the country.

The Supreme Court of Illinois has thus expressed the requirements of a successful contest:

> "Mere notice of rescission for fraud settled nothing. Actual rescission is permitted for fraud without the consent of the other party to a contract where such fraud is shown, but the right to rescind does not exist unless such fraud is proven. Charging fraud and serving notice of rescission cannot, of itself, be a

rescission for fraud. It still remains to be proven whether or not fraud in fact exists. By notice of rescission for fraud the insurer raises an issue of fact and whether the policy is still good or is canceled depends upon the decision of that issue. The law recognizes but two ways of settling issues of fact. They are by stipulation, admission, or agreement, and by proof adduced before a legal body competent to find the fact. The nature of the contract requires that an issue of this character be summarily settled and that it be not permitted to pend throughout the life of the insured."

Powell v. Mut. L. Ins. Co. 313 Ill. 161, 144 N. E. 825.

The recent case of Eichwedel v. Metro. L. Ins. Co., Mo. App., 270 S. W. 415, illustrates the point excellently. In that case, within the contestable period, the insurance company had notified the beneficiary that it would not be liable because of the insured's fraud. In consideration of the repayment to her of the premiums—which she accepted—the beneficiary expressly released the insurer from liability. After the expiration of the contestable period, the beneficiary brought suit on the policy. The court held that the beneficiary could not recover and that the company had taken the affirmative action contemplated by the policy.

The court makes it clear, however, that in the absence of a rescission—the meeting of minds for the purpose of terminating the contract—a judicial pro-

ceeding would have been necessary to prevent the incontestability provision from foreclosing the company of its right to depend upon the ground of fraud.

This is in accord with other well recognized authorities:

> "Rescission is the unmaking of a contract requiring the same concurrence of wills as that which made it, and nothing short of this will suffice. Bishop on Contracts, Sec. 812; Robinson v. Pough, 86 Ala. 257, 5 So. 685."

Clark v. American Devel. & Mining Co., 28 Mont. 468, 72 Pac. 978, 980.

> "The notice of cancellation and a tender of the premium constituted a breach on the part of the defendant, usually designated as a breach of renunciation. . . . . It did not in fact constitute a rescission."

Thistle v. Eq. Life Assur. Soc., Tenn., 261 S. W. 667.

New York Life Ins. Co. v. Adams, Ind. A., 145 N. E. 499, 503.

> "Certainly, in the absence of authority contained in the contract of insurance, the insurer was without power to determine as to the truthfulness of statements contained in the application for insurance, and to declare the policy forfeited."

Mutual Life Ins. Co. v. Buford, 61 Okl. 158, 160, Pac. 928.

American Trust Co. v. Life Ins. Co., 173 N. C., 558, 92 S. E. 706.

It is respectfully urged upon this court, that even had the tender of the premiums and the demand of the policy constituted a "contest," yet it did not operate to end the contract of insurance; and that when suit was brought upon the policy after the termination of the contestable period, neither that "contest," nor any other defense save the nonpayment of premiums, could be made to the action.

VII.

THE BENEFICIARY'S RIGHTS VESTED UPON THE DEATH OF THE INSURED. THE FAILURE TO SECURE THE APPOINTMENT OF AN ADMINISTRATOR OF THE ESTATE OF THE INSURED BEFORE THE TERMINATION OF THE YEAR AFTER THE ISSUE OF THE POLICY DID NOT AFFECT THE RUNNING OF THE LIMITATION ON THE INSURER'S RIGHT TO CONTEST, WHICH EXPIRED ONE YEAR AFTER ISSUANCE OF THE POLICY.

Argument was made before the Supreme Court of the Territory, and we presume it will be made again before this court, that by virtue of the fact that no administrator of the estate of the insured qualified within the year of the issuance of the policy, that there was no one whom the insurance company could sue, and, therefore, the running of the one year contestability limitation period must have been suspended.

The argument is fallacious for two reasons: First, because the beneficiary's right vested upon the death of the insured and any suit thereafter might have been brought immediately against her; and, second, because the contract was drawn by the insurance company, in its own language, so that had a suspension of the period intended, it would have been easy to have provided therefor. For this proposition there is authority of a first rank, the authority of a Circuit Court of Appeals of the United States, together with such support as may be gathered from a denial of a writ of certiorari by the Supreme Court of the United States.

In Northwestern Mut. Life Ins. Co. v. Pickering, 293 Fed. Rep. 496, 498, cert. denied, 263 U. S. 720, the court, in dealing with the contention that the running of the time limited by an incontestability clause was suspended between the date of the insured's death and the date of the appointment of his personal representative, used the following language:

> "The clause in question is a contractural limitation on the insured's right to contest, except for nonpayment of premium. There is no stipulation for a suspension of the running of the limitation during the time elapsing between the date of the insured's death and the date of the appointment of his personal representative. The rights of the parties flow from the contract, which does not stipulate for a suspension of the running of the limitation.

Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386, 391.

VIII.

THIS COURT HAS FULL SCOPE TO REVIEW ALL THE QUESTIONS INVOLVED IN THE CASE SINCE ITS INCEPTION.

The entire case is open for the consideration of this court on writ of error to the Territorial Supreme Court to review a judgment of that court which on a second writ of error affirmed the judgment below entered pursuant to its mandate issued on the first writ of error.

William B. Bierce v. William Waterhouse, 219 U. S. 320, 55 L. Ed. 237.

IX.

THE ISSUE IS ONE OF GENERAL COMMERCIAL LAW. THIS COURT WILL THEREFORE NOT ALLOW ITS JUDGMENT TO BE INFLUENCED BY THE DETERMINATION OF THE LOCAL COURT.

In matters involving the interpretation of local law by the Territorial Supreme Court this court will be strongly influenced by the determination of the local Supreme Court and will affirm that decision or follow the Territorial Court's interpretation unless

there is the very clearest error. This is in analogy to the practice of appellate matters coming from state courts. In state matters, local determination of local questions is absolutely controlling upon the Federal Courts. In Territorial matters, the United States Courts of Appeal are strongly influenced though not absolutely controlled.

But where the issue upon appeal is one of general commercial law, neither in state cases nor in territorial appeals does this court follow the decisions of the local court, but decides the cause according to its own opinion of the merits.

Castle v. Castle, 267 Fed. 521, 524.

Questions involving insurance and the interpretation of insurance contracts are of a general commercial nature, upon which this court will exercise its independent judgment before deciding to affirm or reverse the decision of the local court.

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356.

Carpenter v. The Providence Washington Ins. Co., 16 Peters 495, 506, 10 L. Ed. 1044, 1051.

Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 115, 45 L. Ed. 49, 58.

Thus this court in considering the issue now before it, to-wit, the meaning of an "incontestability" clause of an insurance policy, is free to approach the question with an open mind, uninfluenced by that inclination to support the local court which would govern it had the questions involved been those of purely local law.

CONCLUSION

In conclusion, it is respectfully urged upon the court that the local court erred in affirming the judgment of the Circuit Court upon the second hearing in favor of the Company, and for the following reasons:

Ambiguity in a policy of insurance should be construed in favor of the insured, nor does the requirement of a standard policy change this rule, for the language of the policy remains the language of the Company, and the period of incontestability within the limits set by the legislature is still chosen by the Company;

The repudiation of the rule of construction favorable to the insured because of the adoption of a standard policy was material and should not have been determined, without giving counsel an opportunity to be heard;

The incontestability clause was either ambiguous and so to be construed in favor of the insured to require litigation within the contestable period, or it was unambiguous because of the long line of judicial decisions determining that it required litigation.

A "contest" within the contestability period to be effective must result in a rescission through the meeting of minds or through litigation within that period which gives the court jurisdiction to enter its judgment or decree.

It is further respectfully urged that as the whole case is open to review in this court and as the question is not one of local but is one of general commer-

cial law, public policy should induce the court to follow the great weight of authority and give to insurance policies in Hawaii a uniformity of construction with that which they have received in so many of the states.

Respectfully submitted,

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Honolulu, T. H., October 13, 1925.

APPENDIX

REVISED LAWS OF HAWAII, 1925.

Section 2232. Additional argument by counsel. Upon all questions arising under the exercise of the jurisdiction of the Supreme Court, when argument of counsel may be desired or intended by the parties, or may be requested by the court, the court may order such argument to be had. And after the argument of any cause, or when the same is submitted on briefs, if the court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the same before the court.

Section 3464. Standard life insurance provisions required, industrial excepted. No policy of life insurance other than industrial insurance annuities and pure endowments with or without return of premiums shall be issued or delivered in the Territory or be issued by a life insurance company organized under the laws of the Territory, unless the same shall contain in substance the following provisions:

. . . . . .

(3) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war; that all

statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of the statement or statements be endorsed upon or attached to the policy when issued.